No. 19-10011

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF TEXAS; STATE OF WISCONSIN; STATE OF ALABAMA; STATE OF ARIZONA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KANSAS; STATE OF LOUISIANA; PAUL LePAGE, Governor of Maine; STATE OF MISSISSIPPI, by and through Governor Phil Bryant; STATE OF MISSOURI; STATE OF NEBRASKA; STATE OF NORTH DAKOTA; STATE OF SOUTH CAROLINA; STATE OF SOUTH DAKOTA; STATE OF TENNESSEE; STATE OF UTAH; STATE OF WEST VIRGINIA; STATE OF ARKANSAS; NEILL HURLEY; JOHN NANTZ,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES; ALEX AZAR, II, SECRETARY, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF INTERNAL REVENUE; CHARLES P. RETTIG, in his Official Capacity as Commissioner of Internal Revenue,

Defendants-Appellants,

STATE OF CALIFORNIA; STATE OF CONNECTICUT; DISTRICT OF COLUMBIA; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF KENTUCKY; STATE OF MASSACHUSETTS; STATE OF NEW JERSEY; STATE OF NEW YORK; STATE OF NORTH CAROLINA; STATE OF OREGON; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF VIRGINIA; STATE OF WASHINGTON; STATE OF MINNESOTA,

Intervenor Defendants-Appellants.

On Appeal from the United States District
Court for the Northern District of Texas
(No. 4:18-cv-00167-O)

MOTION OF THE U.S. HOUSE OF REPRESENTATIVES TO INTERVENE

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CERTIFICATE OF INTERESTED PERSONS

Because Movant is a government entity, a certificate of interested persons is not required. 5th Cir. R. 28.2.1.

Dated: January 7, 2019

Respectfully submitted,

s/ Donald B. Verrilli, Jr.
Donald B. Verrilli, Jr.

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Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, the U.S. House of Representatives ("House") respectfully moves to exercise its right to intervene in order to prosecute the appeal of the district court's ruling invalidating the Patient Protection and Affordable Care Act ("ACA"), Pub. L. 111-148, as amended. *See* Mem. Op. and Order, *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex. Dec. 14, 2018) (Dkt. No. 211).[1]

The Plaintiffs and the Federal Defendants oppose this motion; the Intervenor States take no position with respect to this motion.

INTRODUCTION

In 2010, Congress enacted the ACA, a landmark law intended to achieve "near-universal coverage" affordable for all Americans. 42 U.S.C. § 18091(2)(D); *King v. Burwell*, 135 S. Ct. 2480, 2485 (2015). In this litigation, the Plaintiffs asked the district court to invalidate the ACA because, in their view, recent statutory amendments rendered the individual mandate unconstitutional and the rest of the law is inseverable from that provision. The district court agreed, declaring the ACA's individual mandate unconstitutional and inseverable from the rest of the statute.

[1] Attorneys for the Office of General Counsel for the U.S. House of Representatives, including "any counsel specially retained by the Office of General Counsel," are "entitled, for the purpose of performing the counsel's functions, to enter an appearance in any proceeding before any court of the United States or of any State or political subdivision thereof without compliance with any requirements for admission to practice before such court." 2 U.S.C. § 5571(a).

Mem. Op. and Order, *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex. Dec. 14, 2018) (Dkt. No. 211).

On December 30, 2018, the district court entered partial final judgment pursuant to Federal Rule of Civil Procedure 54(b) on Count I. Order Granting Stay and Partial Final Judgment, *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex. Dec. 30, 2018) (Dkt. No. 220). On January 3, 2019, the Intervenor States filed a notice of appeal, docketed in this Court as the instant appeal, No. 19-10011. Notice of Appeal, *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex. Jan. 3, 2019) (Dkt. No. 224). On January 4, 2019, the Department of Justice filed a notice of appeal, which was docketed with the Intervenor States' appeal. Pursuant to House Resolution, H. Res. 6 (January 3, 2019), the House now moves to exercise its right to intervene in these proceedings to defend the ACA.[2]

[2] The House has also moved to intervene in the district court as to the remaining counts in this case pending before that court. The district court held that those counts present "distinct" challenges to the ACA's validity from the challenge raised in Count I, and therefore the district court retains jurisdiction to conduct further proceedings concerning those counts. Order Granting Stay and Partial Final Judgment at 5-6, *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex. Dec. 30, 2018) (Dkt. No. 220). The district court has issued a temporary administrative stay of its proceedings, but has stated that "[s]hould further proceedings . . . become necessary or desirable, any party may initiate it by filing an appropriate pleading." Stay Order and Administrative Closure at 1, *Texas v. United States*, *supra* (Dkt. No. 223).

While the Department of Justice normally defends the validity of Acts of Congress when they are challenged in court, here it has joined the plaintiffs in *attacking* the validity of the individual mandate. It also has argued that the law's "guaranteed-issue" and "community-rating" provisions are inseverable from its individual mandate and thus should be invalidated. Fed. Defs.' Mem. In Response To Pls.' Appl. For Prelim. Inj. at 2, *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex. June 7, 2018) (Dkt. No. 92); *see* Letter from Jefferson B. Sessions III, Attorney General, to Paul Ryan, Speaker, U.S. House of Representatives (June 7, 2018), https://www.justice.gov/file/1069806/download.

By any measure, the exceptional circumstances presented here require recognition of the right of the House to intervene in this Court in order to defend the constitutionality of the federal statute at issue. *See McKenna v. Pan Am. Petroleum Corp.*, 303 F.2d 778, 779 (5th Cir. 1962). The Supreme Court has long recognized that "Congress is the proper party to defend the validity of a [federal] statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." *INS v. Chadha*, 462 U.S. 919, 940 (1983).

Indeed, federal law provides that the Attorney General has a right to intervene in litigation to defend the constitutionality of an Act of Congress, and it empowers the House and/or the Senate to intervene to defend a statute on the rare occasions in

which the Attorney General fails to do so. *See* 28 U.S.C. §§ 2403(a), 530D(b)(2); *In Re Koerner*, 800 F.2d 1358, 1360 (5th Cir. 1986) (House Bipartisan Leadership Group intervened to defend statute's constitutionality). These statutes recognize that the House, as a coordinate Branch of the Federal Government, has a unique institutional interest and prerogative—one not shared by any non-federal party—in defending an Act of Congress against judicial invalidation. *Chadha*, 462 U.S. at 940; 28 U.S.C. § 530D. In light of that unique federal interest, the House's participation will materially aid this Court's consideration of the issues of overriding national importance presented by this appeal.

The considerations that this Court examines in granting intervention on appeal—which parallel the factors set forth in Federal Rule of Civil Procedure 24, governing intervention in the district court—compel granting intervention here. *United States v. Bursey*, 515 F.2d 1228, 1239 n.24 (5th Cir. 1975). The House has a unique institutional interest in this proceeding that cannot be adequately represented by existing parties, it has sought to intervene as soon as it was able to do so, and no prejudice or delay will result.

Accordingly, the House moves to exercise its right to intervene in this case, so that it can defend the constitutionality of the ACA before this Court and contend that any unconstitutional provision is severable from the remainder of the statute.

ARGUMENT

This Court should grant the House's exercise of its right to intervene in this litigation. Because the Executive Branch has taken the position that the ACA is invalid in significant part, the House seeks to exercise its right, recognized by federal statute and the Supreme Court in *Chadha*, to intervene to defend the ACA's validity.

Although no federal rule governs intervention on appeal, the Supreme Court, this Court, and other courts of appeals have confirmed that the principles governing intervention in the district courts should guide the analysis of intervention on appeal. *See, e.g.*, *Automobile Workers, Local 283 v. Scofield*, 382 U.S. 205, 217 n.10 (1965) ("[T]he policies underlying intervention [in the district courts] may be applicable in appellate courts."); *Bursey*, 515 F.2d at 1238 n.24 (quoting same); *Massachusetts Sch. of Law at Andover, Inc. v. United States*, 118 F.3d 776, 779 (D.C. Cir. 1997).

Accordingly, while this Court has indicated that intervention on appeal requires "exceptional" circumstances, *McKenna*, 303 F.2d at 779, it has concluded that those circumstances are present when the Rule 24 factors are satisfied: namely, when the intervenor has a significant stake in the proceeding that cannot be adequately represented by the existing parties; intervention is timely under the circumstances or the intervenor's failure to intervene earlier is justified; and no party will be prejudiced as a result. *Bursey*, 515 F.2d at 1238 n.24. As explained below, the House is entitled to intervene as of right under Federal Rule of Civil Procedure

24(a), and at a minimum is entitled to permissive intervention under Rule 24(b), for the following reasons: federal law, 28 U.S.C. § 530D, recognizes the right of the House to intervene where the Attorney General declines to defend the Act of Congress at issue; the House has timely moved to intervene, four days after it came into existence as the House of the 116th Congress and the first day this appeal was docketed—that is, the day the 116th House could first participate in this appeal; the House's unique interests in defending the validity of an Act of Congress cannot be adequately protected by the existing parties, because the only federal party in the case is not defending the validity of the Act and the House's interests likely will diverge in important respects from those of the Intervenor States; and intervention will cause no prejudice or delay. Moreover, the gravity of the House's institutional interest, as a coequal Branch of the Federal Government, in defending an Act of Congress, leaves no doubt that this case presents exceptional circumstances justifying intervention. Accordingly, intervention by the U.S. House of Representatives must be recognized here.

I. UNDER FEDERAL RULE OF CIVIL PROCEDURE 24(a), THE HOUSE OF REPRESENTATIVES WOULD BE ENTITLED TO INTERVENE AS OF RIGHT.

Under Federal Rule of Civil Procedure 24(a), "[o]n timely motion, the court must permit anyone to intervene who . . . is given an unconditional right to intervene by a federal statute," Fed. R. Civ. P. 24(a)(1), or who "claims an interest relating to

the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest," *id.* 24(a)(2). The rule "is to be construed liberally," with "doubts resolved in favor of the proposed intervenor." *In re Lease Oil Antitrust Litig.*, 570 F.3d 244, 248 (5th Cir. 2009). "[I]ntervention of right must be measured by a practical rather than technical yardstick" and "should generally be allowed where no one would be hurt and greater justice could be attained." *Ross v. Marshall*, 426 F.3d 745, 753 (5th Cir. 2005) (citations and internal quotation marks omitted).

Intervention is particularly appropriate here given that "Congress is the proper party to defend the validity of a [federal] statute when an agency of government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is inapplicable or unconstitutional." *Chadha*, 462 U.S. at 940 (citing *Cheng Fan Kwok v. INS*, 392 U.S. 206, 210 n.9 (1968), and *United States v. Lovett*, 328 U.S. 303 (1946)); *see Koerner*, 800 F.2d at 1360, 1364, 1367; *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 888 n.8 (3d Cir. 1986) ("Congress has standing to intervene whenever the executive declines to defend a statute or, as in this case, actually argues that it is unconstitutional").

Most recently, when the Department of Justice declined to defend the constitutionality of the Defense of Marriage Act (DOMA), the House of the 112th

Congress intervened in more than a dozen cases to defend the law—and some of those cases were on appeal when the House intervened. *See, e.g.*, *Massachusetts v. Dep't of Health & Human Servs.*, 682 F.3d 1, 7 (1st Cir. 2012). Although the Department of Justice contended that the House should be permitted to intervene only to "present[] arguments in support of the constitutionality of Section 3," *see, e.g.*, Def.'s Response to Mot. to Intervene at 2, *United States v. Windsor*, No. 1:10-cv-08435-BSJ-JCF (S.D.N.Y. May 5, 2011) (Dkt. No. 20), no court denied the House full party status.[3] And in other contexts, various courts, including this Court, have routinely granted motions to intervene filed by the House of Representatives. *See Koerner*, 800 F.2d at 1360.[4]

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[3] *United States v. Windsor*, 570 U.S. 744 (2013); *McLaughlin v. Hagel*, 767 F.3d 113 (1st Cir. 2014); *Bishop v. Smith*, 760 F.3d 1070 (10th Cir. 2014); *Cardona v. Shinseki*, 26 Vet. App. 472 (2014); *Cooper-Harris v. United States*, No. 12-cv-00887, 2013 WL 12125527 (C.D. Cal. Feb. 8, 2013); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968 (N.D. Cal. 2012); *Lui v. Holder*, No. 11-CV-01267, 2011 WL 10653943 (C.D. Cal. Sept. 28, 2011); *Aranas v. Napolitano*, No. 12-1137, 2013 WL 12251153 (C.D. Cal. Apr. 19, 2013); *Revelis v. Napolitano*, 844 F. Supp. 2d 915 (N.D. Ill. 2012); *Cozen O'Connor, P.C. v. Tobits*, No. 11-0045, 2013 WL 3878688 (E.D. Pa. July 29, 2013); *Dragovich v. U.S. Dep't of Treasury*, 872 F. Supp. 2d 944 (N.D. Cal. 2012), *vacated in part* (Oct. 28, 2013); *Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp. 2d 294 (D. Conn. 2012); *In re Balas*, 449 B.R. 567 (Bankr. C.D. Cal. 2011).

[4] *See, e.g.*, *Chadha*, 462 U.S. at 930 n.5; *Adolph Coors Co. v. Brady*, 944 F.2d 1543, 1546 (10th Cir. 1991); *Synar v. United States*, 626 F. Supp. 1374, 1378-79 (D.D.C. 1986), *aff'd sub nom. Bowsher v. Synar*, 478 U.S. 714 (1986); *Ameron, Inc. v. U.S. Army Corp of Eng'rs*, 607 F. Supp. 962, 963 (D.N.J. 1985), *aff'd as modified on reh'g*, 809 F.2d 979 (3d Cir. 1986); *Barnes v. Carmen*, 582 F. Supp. 163, 164

In this case, too, intervention as of right by the House is proper. Both of the independent grounds for intervention as of right under Rule 24(a) are satisfied. And the House of Representatives of the 116th Congress "timely" filed this motion, Fed. R. Civ. P. 24(a), the first day the 116th House could participate in this appeal.

A. Intervention as of right under Rule 24(a)(1). First, as would be required by Rule 24(a)(1), the House of Representatives has an unconditional right to intervene pursuant to federal law. As described above, federal law recognizes the uniquely important role of the United States Government in defending the constitutionality of Acts of Congress. Under 28 U.S.C. § 2403(a), "[i]n any action, suit or proceeding . . . wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality." When the Attorney General decides not to defend the validity of an Act of Congress, the House and/or Senate are empowered by statute to intervene in order to exercise that power. Thus, 28 U.S.C. § 530D requires the Attorney General to "submit to the Congress a report of any instance"

(D.D.C. 1984), *rev'd sub nom. Barnes v. Kline*, 759 F.2d 21, 22 (D.C. Cir. 1984), *rev'd on mootness grounds sub nom. Burke v. Barnes*, 479 U.S. 361, 362 (1987); *In re Production Steel, Inc.*, 48 B.R. 841, 842 (Bankr. M.D. Tenn. 1985); *In re Moody*, 46 B.R. 231, 233 (Bankr. M.D.N.C. 1985); *In re Tom Carter Enterprises, Inc.*, 44 B.R. 605, 606 (Bankr. C.D. Cal. 1984); *In re Benny*, 44 B.R. 581, 583 (Bankr. N.D. Cal. 1984), *aff'd in part & dismissed in part*, 791 F.2d 712 (9th Cir. 1986).

in which the Executive Branch declines to defend the constitutionality of an Act of Congress "within such time as will reasonably enable the House of Representatives and the Senate to take action, separately or jointly, to intervene in timely fashion in the proceeding." 28 U.S.C. § 530D(a)(1)(B)(ii), (b)(2). Indeed, as the Supreme Court has observed, "when Congress has passed a statute and a President has signed it, it poses grave challenges to the separation of powers for the Executive at a particular moment to be able to nullify Congress' enactment solely on its own initiative." *United States v. Windsor*, 570 U.S. 744, 762 (2013).

Notably, both Section 2403(a) and Section 530D permit the United States to intervene at any stage in a proceeding, including on appeal, and the Executive Branch routinely does so. *See, e.g.*, *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 167 (5th Cir. 2000) (citing Section 2403(a)); *King v. Marion Circuit Court*, 868 F.3d 589, 593 (7th Cir. 2017). Indeed, Federal Rule of Appellate Procedure 44, which implements Section 2403(a), expressly contemplates that the United States may intervene on appeal, as it provides that a party challenging the constitutionality of a federal statute must "give written notice to the circuit clerk" as soon as the issue is raised, and requires the clerk to notify the Attorney General so that he can intervene. Fed. R. App. P. 44. And in the rare circumstances in which the Executive Branch has declined to defend (or attacked) a federal statute, courts of appeals have treated the House as having a right, materially similar to that of the Executive, to intervene

on appeal. *See, e.g.*, *Massachusetts*, 682 F.3d at 7 (appeal held in abeyance to permit House to intervene); *accord Chadha*, 462 U.S. at 930 n.5, 939 (approving of court of appeals' permission for House and Senate to intervene at rehearing stage).

B. Intervention as of right under Rule 24(a)(2). If there were any doubt about the House's right to intervene under Rule 24(a)(1), there can be no reasonable question that it has a right to intervene under Rule 24(a)(2). That provision permits a party with an interest in the litigation to intervene as of right if "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest" and "existing parties [do not] adequately represent that interest." Fed. R. Civ. P. 24(a)(2); *see Texas v. United States*, 805 F.3d 653, 657 (5th Cir. 2015).

The requirements of Rule 24(a)(2) are fully satisfied here. As Section 530D reflects, the House has a powerful and unique institutional interest in defending an Act of Congress. That interest is fundamental to "the legislative power" in our Federal system, which the Executive Branch's decision that it will not fully defend the constitutionality of an existing statute undermines. *Windsor*, 570 U.S. at 762; *see also Chadha*, 462 U.S. at 940. The House's institutional interest encompasses not only defending the constitutionality of the statute's provisions, but also ensuring the proper application of severability principles, which determine whether other provisions of the statute must fall when one provision is deemed unconstitutional.

Numerous courts have accepted those fundamental interests in recognizing House intervention. *See* pp. 8-9, *supra.*

Here too, no existing party "adequately represent[s]" the House's interest. Fed. R. Civ. P. 24(a)(2). Under Rule 24(a)(2), the House's burden to establish inadequate representation is "minimal," requiring only a showing that representation by existing parties "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see, e.g.*, *Wal-Mart Stores, Inc. v. Texas Alcoholic Beverage Comm'n*, 834 F.3d 562, 569 (5th Cir. 2016) (noting with respect to adequacy of representation "the broad policy favoring intervention"). Although a presumption of adequate representation arises when a governmental entity "charged by law with representing the interests of the [proposed intervenor]" is already a party, or when the proposed "intervenor has the same ultimate objective as a party to the lawsuit," *Edwards v. City of Houston*, 78 F.3d 983, 1005 (5th Cir. 1996), neither presumption defeats intervention here.

First, the U.S. Attorney General plainly does not adequately represent the House's interest in this case. Section 530D establishes that the Justice Department can no longer be regarded as "charged by law with representing the interests" of the House, *Edwards*, 78 F.3d at 1005, when the Department has decided not to defend a statute. *See* 28 U.S.C. § 530D(b)(2). In addition, the Attorney General plainly has a different ultimate objective in this case than the House does, because he (like the

Plaintiffs) has affirmatively argued that the individual mandate is unconstitutional and inseverable from other provisions. The House disagrees with, and will argue against, that position, which (if enforced) would erase in significant part the statute that Congress enacted. *See Ross*, 426 F.3d at 761.

Second, the Intervenor States do not adequately represent the House's interests. They are not charged with representing the institutional interests of any part of the Federal Government. Indeed, federal law specifically recognizes the value of having a federal party defending the constitutionality of a federal statute. 28 U.S.C. §§ 2403(a), 530D. These provisions reflect the unique interest, not shared by any non-federal party, that Branches of the Federal Government have in defending the constitutionality of a federal statute. The House, unlike the Intervenor States, is part of a "coequal branch of government." *Rostker v. Goldberg*, 453 U.S. 57, 64 (1981). Its "Members take the same oath [members of the judiciary] do to uphold the Constitution of the United States." *Id.* The House thus has an institutional interest not only in defending an Act of Congress against constitutional challenge, but also in defending its prerogative, as a coordinate Branch of government, to interpret the Constitution and to pass laws based on that interpretation. *Cf. United States v. Harris*, 106 U.S. 629, 635 (1883) ("Proper respect for a co-ordinate branch of the government requires the courts of the United

States to give effect to the presumption that congress will pass no act not within its constitutional power.").

Moreover, the interest of the Intervenor States is potentially adverse to the interest of the House in important respects. *See Texas*, 805 F.3d at 662. For instance, the Intervenor States did not argue in their briefs before the district court that the Plaintiffs lack standing, *see* Mem. Op. and Order at 15 & n.6, *Texas v. United States*, No. 4:18-cv-00167-O (N.D. Tex. Dec. 14, 2018) (Dkt. No. 211)—and such an argument may well run counter to the States' long-term interest in arguing for broad and permissive state standing. The House, however, wishes to ensure that the Plaintiffs demonstrate truly concrete and particularized harm before they may challenge a federal law. The Intervenor States therefore cannot adequately represent the House's interest in that respect.

That adversity of interests may well extend to the merits of the arguments about the constitutionality of 26 U.S.C. § 5000A, because both the standing issue and the issue of Section 5000A's constitutionality turn on the question whether Section 5000A (as amended) actually mandates that covered individuals obtain minimum essential health-care coverage. *See* Mem. Op. and Order at 27-34, *Texas v. United States*, *supra* (Dkt. No. 211). The Intervenor States may be unable to make a full-throated defense on the merits because doing so would undermine their claim to standing.

The divergence of interests between the House and the Intervenor States thus meets the House's "minimal" burden to show that existing representation "may be" inadequate and to entitle the House to participate as a party on appeal. *Trbovich*, 404 U.S. at 538 n.10; *see, e.g.*, *Wal-Mart Stores*, 834 F.3d at 569; *Edwards*, 78 F.3d at 1005-06; *Aransas Project v. Shaw*, 404 F. App'x 937, 941 (5th Cir. 2010) (noting that a federal defendant "could not advocate for . . . a state").

In short, whether this Court construes Section 530D as vesting the House with an unconditional right to intervene, or as making explicit the House's interest in litigation in which the Justice Department refuses to defend a federal law, intervention as of right would be warranted in the district court, triggering Rule 24's requirement that a district court permit the House to intervene so long as the intervention motion is "timely." Fed. R. Civ. P. 24(a). Because the same interests underlie intervention in the court of appeals—the House unquestionably has a "significant stake" in the litigation, *see Bursey*, 515 F.2d at 1238 n.24—this Court should permit the House to intervene.

C. Timeliness of intervention motion. This motion is timely. As this Court has recognized, determining whether a motion to intervene is timely requires a "contextual" analysis, and "absolute measures of timeliness should be ignored." *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994). The key question is whether the timing of the intervenor's motion prejudices the original parties to the

proceeding. *Id.* Thus, "[f]ederal courts should allow intervention 'where no one would be hurt and greater justice could be attained.'" *Id.* (quoting *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1074 (5th Cir. 1970)); *Ross*, 426 F.3d at 754 (permitting intervention subsequent to district-court judgment "provided that the rights of existing parties were not prejudiced and intervention did not interfere with the orderly processes of the court").

That permissive standard has led this Court to adopt a contextual four-factor test for timeliness of intervention in the district court. Under that test, a court should consider (1) "[t]he length of time during which the would-be intervenor actually knew or reasonably should have known of its interest" before it sought to intervene; (2) "the extent of the prejudice that the existing parties" may suffer due to the "intervenor's failure to apply for intervention as soon as it knew or reasonably should have known of its interest"; (3) "the extent of the prejudice that the would-be intervenor may suffer if intervention is denied"; and (4) "the existence of unusual circumstances militating either for or against a determination that the application is timely." *Sierra Club*, 18 F.3d at 1205. "A motion to intervene may still be timely even if all the factors do not weigh in favor of a finding of timeliness." *John Doe No. 1 v. Glickman*, 256 F.3d 371, 376 (5th Cir. 2001).

In this case, all four factors do strongly militate in favor of permitting intervention. First, the House moved to intervene on the first day the 116th House

could participate in this appeal. *See* U.S. Const. amend. XX, § 2 ("The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January . . . ."). The House of Representatives is not a "continuing body," and there is a different House with the start of each new Congress. *United States v. AT&T Co.*, 551 F.2d 384, 390 (D.C. Cir. 1976); *see Comm. on the Judiciary of the U.S. House of Representatives v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (noting that "the 110th Congress ends on January 3, 2009" and "[a]t that time, the 110th House of Representatives will cease to exist as a legal entity"). Thus, before January 3, 2019, the 116th House did not exist and had no interests to assert. It moved to intervene in the district court not only as soon as it "knew . . . of its interest in the case" but also as soon as those interests came into being. *Sierra Club*, 18 F.3d at 1205; *cf. Glickman*, 256 F.3d at 376-77. The House then immediately moved to intervene in this appeal once a notice of appeal was filed—depriving the district court of the ability to grant intervention as to Count I—and the appeal was docketed in this Court.

Second, no prejudice to the Court or the existing parties will result from the House intervening now. The House will coordinate with the other parties to ensure that intervention does not affect scheduling, and will submit briefs consistent with any scheduling order issued by this Court. This Court has found an absence of prejudice when district courts allowed intervention even after judgment was entered,

where, as here, the only "inconveniences . . . [were] those commonly associated with defending a ruling or judgment on appeal, and would have arisen regardless of whether [the intervenor] sought to intervene before the district court entered its amended judgment." *Ross*, 426 F.3d at 756; *see, e.g.*, *Stallworth v. Monsanto Co.*, 558 F.2d 257, 267 (5th Cir. 1977); *Wal-Mart Stores*, 834 F.3d at 565-66. This Court has likewise considered the prejudice to other parties and potential delay of proceedings when considering intervention on appeal. *See Sierra Club*, 18 F.3d at 1206 (no prejudice where party intervened to appeal injunction); *see also* 15A Charles Alan Wright & Arthur Miller, 15A *Federal Practice and Procedure* § 3902.1 (2d ed.).

Third, both the House of Representatives and the public at large will suffer if intervention is denied. The federal statutes contemplating intervention by the U.S. government reflect the fact that "declar[ing] an Act of Congress unconstitutional . . . is the gravest and most delicate duty" that a court "is called on to perform," *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J.), and that a court should endeavor not to do so without the participation of a federal entity defending such an Act. If permitted to intervene, the House would be the only organ of the Federal Government defending the constitutionality of the ACA, and it would assert arguments likely distinct from those of the Intervenor States. It is therefore important to the interests of the United States, the fair administration of justice, and

the public's perception that the Judiciary has impartially considered all arguments in support of a law's constitutionality that the House be permitted to intervene.

Finally, this Court has explained that, even if a court determines that an intervenor failed to promptly seek intervention, that entity may nevertheless demonstrate timeliness by providing "convincing justification[s] . . . that for reasons other than lack of knowledge he was unable to intervene sooner." *Stallworth*, 558 F.2d at 266. For the reasons explained above, the House of Representatives did promptly intervene here. But to the extent this Court disagrees, the change of House leadership, and the House's status as a distinct legal entity when it is reconstituted following an election, provide the requisite "convincing justification" and render the motion timely.

II. IN THE ALTERNATIVE, UNDER FEDERAL RULE OF CIVIL PROCEDURE 24(b), THE HOUSE OF REPRESENTATIVES WOULD BE ENTITLED TO PERMISSIVE INTERVENTION.

The House would also satisfy the standard for permissive intervention under Rule 24(b). Under that Rule, "[o]n timely motion, the court may permit anyone to intervene who . . . is given a conditional right to intervene by a federal statute," Fed. R. Civ. P. 24(b)(1)(A), or who "has a claim or defense that shares with the main action a common question of law or fact," *id.* 24(b)(1)(B). Because the House satisfies both independent grounds of Rule 24(b)(1) and its participation would not

cause any delay or prejudice, permissive intervention before a district court would be warranted.

First, to the extent this Court concludes that 28 U.S.C. § 530D does not provide an unconditional right to intervene, that statute, at a minimum, provides "a conditional right to intervene" in proceedings where the Attorney General declines to defend a federal law, thus satisfying Rule 24(b)(1)(A). Congress's determination that either chamber can do so at a minimum demonstrates that the House has a conditional right to intervene.

Second, the House seeks to address the same questions of law that the original parties to this suit are addressing, and therefore "has a . . . defense that shares with the main action . . . common question[s] of law." Fed. R. Civ. P. 24(b)(1)(B).

Finally, intervention would not "unduly delay or prejudice the adjudication of the original parties' rights," *id.* 24(b)(3), because the House seeks only to adjudicate the rights of the original parties, so as to ensure that this Court and, potentially, the Supreme Court have the benefit of full briefing on all sides of this case. The House will file papers on the same schedule as the other parties. "[N]o one would be hurt and the greater justice could be attained" by permitting the House to intervene, so this Court "should allow intervention." *Texas*, 805 F.3d at 657.

CONCLUSION

For the foregoing reasons, the motion by the House of Representatives to intervene should be granted.

Dated: January 7, 2019

Respectfully submitted,

s/ Donald B. Verrilli, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2019, the foregoing document was filed with the Clerk of the Court, using the CM/ECF system, causing it to be served on all counsel of record.

Dated: January 7, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A), because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,173 words.

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